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No. 85-77

In The

Supreme Court of the United States

October Term, 1985

JOHN RASKIEWICZ,

Petitioner,

vs.

THE TOWN OF NEW BOSTON, MANCHESTER REDIMIX CONCRETE, INC., et al,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI FOR RESPONDENTS, THE TOWN OF NEW BOSTON, ROLAND SALLADA, HAROLD STRONG, THOMAS MANSFIELD, GEORGE HAWKINS, OLIVER ANDREWS AND MERRILL TODD

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STATEMENT OF THE CASE

The Petition for Certiorari before this Court is the latest and, Respondents hope, final round in a sequence of litigation instituted by the Petitioner against the small Town of New Boston, New Hampshire dating back to 1974. The time and expense devoted to this litigation by the

Town has been extraordinary (*see, e.g.* A. 673-678);[1] responding to it is made even more difficult by the constantly shifting nature of the Petitioner's claims. Two issues were presented to the First Circuit Court of Appeals: (1) "whether the District Court erred in granting summary judgment against John Raskiewicz, on all or any of his claims", those claims having been originally set forth in an 85-page complaint seeking damages of Ninety Million Dollars ($90,000,000.00), and (2) "whether the District Court's imposition of sanctions against John Raskiewicz and his trial counsel was erroneous." The First Circuit having answered both questions in favor of Respondents, Petitioner now seeks to have this Court consider seven additional issues without once addressing this Court's statement in Supreme Court Rule 17 of the controlling grounds for granting certiorari. That fact alone, the Respondents respectfully suggest, should be dispositive of the instant Petition.

The alleged and record facts and procedural posture of this case are fairly and accurately set forth in the Opinion below (PA 1-13). Essentially, this is an attempt by the petitioner to premise constitutional (42 U.S.C. §1983) and antitrust (Sherman Act, 15 U.S.C. §1) claims on the enforcement by the New Boston Selectmen of a lawfully-enacted gravel permit ordinance, the constitutionality of which has been upheld by the New Hampshire Supreme Court, *Flanagan v. Town of Hollis,* 112 N.H. 222, 293 A.2d

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[1] References to the record below refer to the Appendix before the Court of Appeals and will be cited as "A" followed by a page number. Citations to the opinions below will be from the appendix to the petition for writ of certiorari and will be cited as "PA" followed by a page number.

328 (1972), and which was not challenged below. Normally, the Respondents would be content to leave their Statement of Facts at that.

However, the Respondents Town and Selectmen are concerned by the number of factual errors and misrepresentations in the Petitioner's Statement of the Case. For example, Petitioner states that at the time the District Court held its hearing, "discovery was at a standstill." In fact, the Respondents had agreed to make themselves available for deposition, provided the Petitioner was likewise made available; and it was only due to scheduling difficulties on both sides and lack of follow-up by Petitioner's counsel that these were not held. (*See, e.g.,* App. 785.) Additionally, the Respondents produced, not "a few" (as claimed by Petitioner), but virtually *all* the unprivileged documentation in their possession relevant to the case (none of which, except for the transcript of the 1976 State court hearings, was submitted by the Petitioner to the Court in opposing the Motion for Summary Judgment) (A. 324, 598-600, 605-606). In any event, since the First Circuit construed the facts, as it was obliged to do, in a way most favorable to Petitioner, (PA 2) it is difficult to see what Petitioner could have gained by additional discovery.

The Petitioner refers to his state court litigation. Not only does he erroneously state that it included a claim for "damages" (Petition for Writ of Certiorari at 5, 9; *see* A. 1261), but he also fails to acknowledge that it was *he* who voluntarily relinquished his so-called First Amendment right when he abandoned that lawsuit (PA 7, 30). He also sold the subject land—not for a "distressed price", as he claims, but for Two Hundred Seventeen Thousand

Dollars ($217,000.00), (PA 9), Two Hundred Thirteen Thousand Dollars ($213,000.00) more than he paid for it (PA 2).

The most egregious misstatement or omission, however, as earlier noted, is that the claims Petitioner now seeks to raise before this Court were never briefed and argued, at least in the fashion he now seeks to present them, to the First Circuit. One searches Petitioner's Brief below in vain for a reference to 36 of the 49 cases he has cited to this Court. The "First Amendment" claim upon which the Petitioner relies so heavily *now* was not even alleged in his Complaint; and the only reference to it in his Brief below is in a footnote (Brief for Appellant at p. 8, n. 7). Supreme Court Rule 21.5 provides that "[t]he failure of a petitioner to present with accuracy, brevity and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition." Because petitioner has failed to comply with this Rule, and because this Petition raises no special or important issues of the type specified in Supreme Court Rule 17, which would warrant exercise of this Court's discretion to grant certiorari, the Petition should be denied.

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REASONS FOR DENYING THE WRIT

I. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE IT PRESENTS NO REASONS OF THE TYPE SPECIFIED IN SUPREME COURT RULE 17 WHICH MERIT THIS COURT'S REVIEW; BECAUSE IT FAILS TO PRESENT THE FACTS AND ISSUES IN AN ACCURATE AND CLEAR FASHION; AND BECAUSE THERE IS NO SHOWING THAT THE CONCURRENT FINDINGS OF BOTH COURTS BELOW THAT THE CASE RAISES NO GENUINE ISSUES OF MATERIAL FACT SUFFICIENT TO SUPPORT A JUDGMENT FOR PETITIONER WERE ERRONEOUS.

There are essentially three reasons for denying the Petition for Certiorari: (1) the absence of any special or important reasons of the type specified in Supreme Court Rule 17 for granting the Writ; (2) Petitioner's failure to comply with Supreme Court Rule 21.5; and (3) the absence of any special circumstances to justify setting aside the concurrent findings of *both* lower courts that this case raises no genuine issues of material fact sufficient to support a judgment in Petitioner's favor.

While ignoring Supreme Rule 17,[2] Petitioner attempts to convert what were essentially adverse factual determinations by the two lower courts into a claim that, by finding that he had failed to allege or prove any genuine issues of material fact, the United States Court for the District of New Hampshire and the United States Court of Appeals

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[2] Respondents do not address Rule 17 in detail in this Brief, but refer to and concur with the arguments made in the Brief of Respondents Manchester Redimix Concrete, Inc. and Norman Bissonnette.

for the First Circuit failed to recognize his rights under the First, Fifth and Fourteenth Amendments to the United States Constitution. This Court, however, has clearly recognized the propriety of, and indeed, strongly encouraged summary judgment in cases such as this. *See, e.g. Harlow v. Fitzgerald,* 457 U.S. 800, 814-819 (1982); *Butz v. Economou,* 438 U.S. 478, 507-508 (1978). (Summary judgment in civil rights actions against government officials proper on, *inter alia,* ground of official immunity.)

Yet, though thinly disguised as an appeal on issues of *law,* what the Petitioner is really asking this Court to do is to make additional findings of *fact,* or to find that there exist genuine and material factual disputes, despite the lack of support therefor in the record. In *Southern Power Co. v. Public Service Co.,* 263 U.S. 508 (1924) this Court dismissed a Petition for Writ of Certiorari on this basis. The Petition in *Southern Power Co. v. Public Service Co.,* 263 U.S. 508 (1924) *alleged* an important question of constitutional law, but arguments before this Court revealed that the relevant issue was primarily one of fact.

In the instant case, the Petitioner makes much of his claim that the Town of New Boston deprived him of what he says is his "First Amendment right of access to the courts." The *fact* is that the Petitioner, of his own accord, chose not to pursue his action in the New Hampshire courts. (PA 7, 30) That he now seeks to challenge the decisions of the courts below on, *inter alia,* the ground that they allegedly incorrectly applied New Hampshire law (Petition for Writ of Certiorari, p. 1, 11-15), seems ironic, to say the least, since he voluntarily gave up the opportunity to have his case decided under New Hampshire law. In any event, the Petitioner's belated insistence upon his novel claim that

it is unconstitutional for a municipality to attempt to settle a case by conditioning its offer on termination of pending litigation is hardly an issue deserving of this Court's time, especially since it was barely mentioned in the courts below. *Shelley v. Kraemer,* 334 U.S. 1 (1948); *Corrigan v. Buckley,* 271 U.S. 323 (1926) (only constitutional issues specifically raised in lower courts are before the Supreme Court on appeal); *Duignan v. U.S.,* 274 U.S. 195 (1927); *Virtue v. Creamery Package Mfg. Co.,* 227 U.S. 8 (1913).

In addition to his First Amendment claim, the Petitioner asserts that his rights to procedural due process under the Fourteenth Amendment and to be compensated for a deprivation of his property for the public benefit under the Fifth Amendment were denied by New Boston's initial denial of his gravel permit application. Neither the lower courts nor Respondent deny that those rights exist; it is not clear why the Petitioner devotes so much space to establish their existence. (*e.g.* Petition at 16-19) Rather, the issue on which Petitioner and the lower courts differ is whether the *facts,* as alleged by him and as established by documents and affidavits filed with the District Court, establish a violation of those rights.

The procedures followed by Respondents in acting on Petitioner's application included two hearings, and "notice" of the scope of the hearings, in the form of, *inter alia,* the gravel ordinance itself, which specified in detail the health and safety requirements to be addressed by the applicant (A. 323, PA 3-4) There is no allegation that the requirements of the ordinance were not met. Even if it could be found that these producers fell short of what the flexible concept of due procedures requires, *cf. Mathews v.*

Eldridge, 424 U.S. 319, 334 (1976), the *fact* is that the Petitioner had a full right to appeal to the New Hampshire State courts. Nowhere does he even *claim* that those appeal procedures were constitutionally inadequate. "Where a state has provided reasonable remedies to rectify a legal error by a local administrative body . . . current authority indicates that due process has been provided." *Creative Environments v. Estabrook,* 680 F.2d 822, 832, *n.* 9 (1st Cir. 1982), *cert. denied* 459 U.S. 989 (1982), *citing Ingraham v. Wright,* 430 U.S. 651 (1977); *Parratt v. Taylor,* 451 U.S. 527, 542 (1981). *See also, Hudson v. Palmer,* — U.S. —, 104 S. Ct. 3194 (1984); *City of Eastlake v. Forest City Enterprises, Inc.,* 426 U.S. 668, 677 (1976).

Petitioner also suggests that the alleged bias of the Board of Selectmen contributed to the claimed denial of his due process rights. He premises his claim, not on federal constitutional grounds, but on a New Hampshire Supreme Court decision, *Winslow v. Town of Holderness Planning Board,* — N.H. —, 408 A.2d 114 (1984). a case decided after the entry of summary judgment in this case, on *state law* grounds. Petitioner asserts this claim based on an alleged statement by Respondent Selectman Roland Sallada that Petitioner "would never receive a permit." The lower courts accepted this allegation as true only for the purpose of the summary judgment motion. As a matter of fact, Mr. Sallada denies he ever made the statement. Even if he did so, however, the allegation is immaterial. As *Winslow* illustrates, Petitioner had adequate remedies in the state court system, and the Town (including then Selectman Sallada) in fact twice offered Petitioner a permit. (A. 302-317).

As to whether the Petitioner's property was "taken" without just compensation, this Court has held that there is no Fifth Amendment violation where the application of a local land use regulation falls short of depriving a landowner of the "economically viable use of his land." *Agins v. Tiburon,* 447 U.S. 255, 260 (1980). (Supreme Court will not review demurrer granted by State court despite uncontroverted allegation that zoning ordinance in question "completely destroyed the value of [appellant's] property for any purpose or use whatsoever." *Id.* at 259, n. 6) *See also, Kirby Forest Industries, Inc. v. U.S.,* — U.S. —, 104 S. Ct. 2187 (1984) (Impairment of value, even substantial reduction of attractiveness to potential purchasers, doesn't result in unconstitutional taking, at least in absence of right to dispose of land). This Court has specifically upheld the application of an ordinance prohibiting land excavation in circumstances much more compelling than the Petitioner's, where the property owner had been operating a sand and gravel business for thirty years. *Goldblatt v. Hempstead,* 369 U.S. 590 (1962). (Ordinance not unconstitutional merely because it deprives property of its most beneficial use.)

The *facts* of the instant case are that Petitioner had owned his land for ten years before he sought to remove gravel from it (A. 732), that he had derived income from it through lumber operations, (A. 845, 942, 996-997, 1055-1062), and that he was able to sell his land in 1979 for a profit of $213,000.00 (A. 732, 409-486). Under these circumstances Petitioner has simply failed to state a Fifth Amendment claim.

In addition to his constitutional claims, the Petitioner attempted, obviously because of the attractive prospect of

treble damages, to raise an antitrust claim. Again, his Petition ignores the factual basis on which *this* claim was dismissed. Though his Petition states that he "alleged collusive activity by the [New Boston] Board [of Selectmen], Redimix and others to deny him a permit", (Petition for Writ of Certiorari at 20) the fact is that no such collusion existed, nor does the record support any allegation thereof.

> It is uncontested that Redimix had no involvement with the Town or Raskiewicz before Raskiewicz's agent contacted the company in the summer or fall of 1979. At that point in time, Raskiewicz had twice been offered a permit after extensive negotiations, had chosen not to accept them, and, by his own admission, had given up his quest for a permit. The timing of Redimix's entry on the scene alone punctures the inference that the Board and Redimix conspired to deprive Raskiewicz of a permit during the years he sought one (1974-1979).

(PA 16).

Given the facts of this case, and the state of the law when Petitioner initiated this lawsuit in 1983, the imposition of sanctions against Petitioner by the District Court was clearly justified. In addition, the District Court's Order was justified by the reckless and vexatious manner in which the Petitioner sought to litigate his claims. His $90 million dollar lawsuit was brought, not only against the Town, its present and former selectmen, the purchaser of Petitioner's land, and one of its officers individually, but also against all of the New Boston townspeople who had sought to exercise their *own* First Amendment rights to oppose Petitioner's attempt to obtain a gravel permit, both at the Town level and in the New Hampshire State courts. The Petition for Writ of Certiorari contains no mention of

that fact, even though one of those people, Patricia Getman Andrews, *remains* to this day as a party. The judgment in her favor by the District Court has not been satisfied and at no time has she been dismissed as a party; yet, perhaps recognizing the utter baselessness of his claim against her, the Petitioner has not even *listed* her as a party to this proceeding. (Petition at iii).

While failing to now acknowledge his initial claim against the townspeople, Petitioner recklessly seeks to add yet *another* party to his ephemeral "conspiracy"—the United States District Court judge who entered the Order below. Petitioner belatedly claims that Judge Martin F. Loughlin should have *sua sponte* disqualified himself from the proceedings below on the basis that, as a then New Hampshire State judge, he "heard this case below" (meaning the state court proceedings). (Petition at 6, n. 3) That assertion is absolutely *false,* and Petitioner knows it. The state court case was heard by a Master, pursuant to local rules and procedures. The only action taken by then New Hampshire Superior Court Justice Loughlin in the State case was to sign a decree on July 8, 1977, on the basis of the Master's Order, "to which there was no objection." (PA 5-6, A. 1280-1283). This fact was a matter of record at the District Court level below (A. 1255, 1284), yet no request was made by Petitioner at that time that Judge Loughlin recuse himself. To now contend that Judge Loughlin (who at no time had any "personal knowledge" of the "disputed evidentiary facts" and probably did not even remember his ministerial approval of a Master's Order five years earlier) should have recused himself on his own motion is patently frivolous, manifesting again Petitioner's bad faith, and reckless disregard of the facts throughout these proceedings.

CONCLUSION

On the basis of Supreme Court Rules 17 and 21.5, and because the concurrent findings of the two lower courts that there exist no genuine disputed issues of material fact sufficient to support a judgment in Petitioner's favor were not clearly erroneous, the below-named Respondents respectfully pray that the Petition for Writ of Certiorari be denied; that they be awarded their reasonable attorneys' fees and costs relating to said Petition (both the District and Circuit Court of Appeals before having awarded costs and fees at those levels on the ground that Petitioner's claims were specious); and for such other and further relief as may be just.

Respectfully submitted,

THE TOWN OF NEW BOSTON, ROLAND SALLADA, HAROLD STRONG, THOMAS MANSFIELD, GEORGE HAWKINS, OLIVER ANDREWS, AND MERRILL TODD

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